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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1974 NO.

UNITED STATES OF AMERICA

-v-

LOUIS ANTHONY FRESTA, JR.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
THIRD CIRCUIT

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DISCUSSION OF LOWER COURT OPINIONS

The issue here raised regarding hear-say declarations of co-conspirators first arose at Petitioner's trial on July 23 and 24, 1973. At that time, Petitioner's counsel objected to admitting into evidence all statements made by Petitioner's co-defendant without first requiring the Government to demonstrate the Petitioner's membership in/criminal conspiracy charged. The Trial Court overruled the objection to the evidence.

After the jury returned with a verdict of guilty, Petitioner iterated his objection to the hear-say evidence in a Motion for New Trial which Motion was denied by Order and Opinion of the Trial Judge, HON. LOUIS C. BECHTLE, dated December 7, 1973. Timely notice of appeal was filed and by Judgment Order dated July 22, 1974, the Circuit Court of Appeals

affirmed JUDGE BECHTLE'S ruling. This Petition is brought to seek review of that Judgment Order in the Circuit Court of Appeals.

JURISDICTIONAL STATEMENT

Petitioner herein seeks Certiorari to the Third Circuit Court of Appeals to review that Court's Judgment Order of July 22, 1974 affirming the Judgment of Conviction and Sentence in the District Court. This Petition is timely filed within 30 days of the Circuit Court of Appeals' Order of August 13, 1974 denying Petitioner's Application for Rehearing en banc.

Jurisdiction for Certiorari rests upon 28 U.S.C.A. §1254(1) wherein the Supreme Court's jurisdiction on appeal is stated:

> "Section 1254. Courts of Appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition

of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF QUESTIONS PRESENTED

When the Trial Court admits into evidence a series of telephone conversations including several highly inculpatory conversations involving Petitioner's co-defendant and third parties unknown to the Petitioner, subject to the provision that the Court will determine after the introduction of all conversations, whether sufficient evidence exists to prove the Petitioner's membership in the criminal conspiracy charged, in order to support the admission of hear-say declarations by co-conspirators, is such a procedure improper because:

I. DECISIONS OF THE UNITED STATES SUPREME COURT REQUIRE DETERMINATION THAT PROOF ALIUNDE OF CONSPIRACY EXISTS PRIOR TO ADMITTING CO-CONSPIRATORS' STATE- AND THE EXISTENCE OF CONSPIRACY MAY NOT BE PROVED BY REFERENCE TO THE VERY STATEMENTS WHOSE ADMISSIBILITY DEPENDS UPON THAT PROOF?

II. RECENT DECISIONS IN THE THIRD CIRCUIT COURT OF APPEALS DEALING PRECISELY WITH ANALAGOUS CASES HAVE HELD THAT WHERE MEMBERSHIP IN THE CRIMINAL SCHEME CANNOT BE PROVEN BY CLEAR AND CONVINCING EVIDENCE IT MAY NOT BE INFERRED FROM THE STATEMENTS OF ALLEGED CO-CONSPIRATORS?

III. THE PRACTICE OF ADMITTING HEAR-SAY DECLARATIONS SUBJECT TO A LATER DETERMINATION OF WHETHER CONSPIRACY EXISTS, SUBJECTS INNOCENT DEFENDANTS TO A GREAT LIKELIHOOD OF AN UNFAIR FINDING OF GUILT?

SUMMARY OF FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In general, the entire basis for MR. FRESTA'S Petition rests upon the provision of the Sixth Amendment to the United States Constitution guaranteeing the right to confront adversary witnesses. That Amendment reads as follows:

AMENDMENT VI [1791]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis added).

An exception has been created to the confrontation right when the absent declarant spoke as a co-conspirator acting as an

agent in furtherance of the interests of the party against whom the statement is sought to be admitted. For example, Federal Rule of Evidence, 801(d)(2)(E) provides: "A statement is not hear-say if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

BASIS FOR ORIGINAL JURISDICTION IN THE DISTRICT COURT

Petitioner was charged with violation of the following Federal Statutes by an indictment dated March 28, 1973:

21 U.S.C.A. §841(a)(1)
Conspiracy to Distribute and Manufacture Controlled Substances

21 U.S.C.A. §846
Conspiracy to Import Controlled Substances

21 U.S.C.A. §963
Conducting Ongoing Business in the Importation of Illegal Drugs

18 U.S.C.A. 1952
Use of Interstate Commerce in Promotion of Criminal Activity

Original jurisdiction rests in the United States District Court for each of these Federal criminal offenses.

STATEMENT OF THE CASE

Petitioner seeks review of the Judgment Order of the Circuit Court of Appeals of July 22, 1974 affirming the Judgment of Conviction and Sentence in the District Court and the subsequent Order by the Circuit Court dated August 13, 1974 denying the Petition for Rehearing en banc. The Petitioner was tried before a jury on July 23 and 24, 1973 and found guilty of conspiring to import controlled substances. After the finding of guilt, the Trial Judge HON. LOUIS C. BECHTLE, of the District Court for the Eastern District of Pennsylvania, raised bail from $25,000.00 to $35,000.00 surety bond, pending dispsotion of Post-trial Motions. After denying the Motion for a New Trial and for Judgment of Acquittal by Opinion and Order dated December 7, 1973 (See page 40

infra), JUDGE BECHTLE, on January 11, 1974, sentenced the Petitioner to ten years imprisonment followed by three years special parole on Counts I and II of the indictment, as well as five years imprisonment concurrent on Count III of the indictment. After Notice of Appeal was filed, the Circuit Court of Appeals affirmed the Judgment of Conviction and Sentence on July 22, 1974, and this Petition seeks review of that Order.

At trial, the Government's evidence consisted principally of the results of electronic interceptions made between November 30, 1972 and December 16, 1972 on a telephone alleged to have been used by GAETANO LICATA, the indicted co-conspirator of the Petitioner. The wire-tap on LICATA'S telephone ended when he departed for Canada. Federal agents of

the Bureau of Narcotics and Dangerous Drugs followed him to Montreal, continued physical surveillance of his activities there, and pursued him back to the Canadian Border, where he was arrested in possession of ten pounds of fairly pure heroin. Throughout his trip, LICATA carried a driver's license and some other identification in the name of LOUIS A. FRESTA, the Petitioner. This fact, along with the fact that LICATA used a suitcase supplied by the Petitioner to carry his clothes on the Canadian trip, constituted virtually all tangible evidence of the Petitioner's membership in the drug importation conspiracy.

At trial, Petitioner's counsel insisted that MR. FRESTA had supplied his suitcase and driver's license for innocent purposes and without knowledge of LICATA'S

intention to import drugs from Canada. The prosecution argued that telephone conversations involving FRESTA and LICATA proved FRESTA'S knowing complicity in the heroin importation scheme. Although the Petitioner argued that those conversations consisted exclusively of meaningless expressions in some unknown code or slang, the Government insisted that the culpable nature of the discussions could be inferred by interpreting them in light of other conversations engaged in by LICATA with other known participants in his heroin business.

The primary basis for the Petitioner's Appeal to the Circuit Court of Appeals and for this Certiorari application rests upon the Trial Court's admitting into evidence against the Petitioner all hearsay declarations made by LICATA to other co-conspirators without first requiring

the Government to prove independently the existence of a conspiracy to import heroin and the Petitioner's membership in that conspiracy. At trial, the Government sought to introduce all telephone conversations monitored on GAETANO LICATA'S telephone in chronological order. The Petitioner objected that conversations involving LICATA and third persons were inadmissible against the Petitioner without a showing of clear and independent evidence proving that the Petitioner was engaged in a drug conspiracy with LICATA. Over the objections of Petitioner's counsel, the Trial Court received all of the conversations as the Government offered them subject to a later finding of sufficient proof of a conspiracy to permit introduction of those conversations to which the Petitioner was not a party. When the Court did finally review the evidence to

determine whether the requisite proof aliunde of conspiracy existed, JUDGE BECHTLE determined that conversations between FRESTA, the Petitioner, and GAETANO LICATA supported an inference that FRESTA knowingly participated in the conspiracy when such conversations were interpreted in light of conversations involving LICATA and third persons unknown to FRESTA. In other words, the Trial Court supported the admission against FRESTA of hear-say declarations made by the alleged co-conspirator, LICATA, to third persons by inferring the existence of the necessary proof aliunde by reference to the very hear-say declarations whose admissibility was in issue. This procedure for admitting the hear-say declarations of Petitioner's co-defendant forms the basis for Petitioner's claim for relief in this pleading.

ARGUMENT

I. THE CIRCUIT COURT OF APPEALS HOLDING THAT THERE EXISTED SUFFICIENT EVIDENCE OF PETITIONER'S MEMBERSHIP IN A HEROIN IMPORTATION CONSPIRACY TO PERMIT INTRODUCTION OF HEAR-SAY DECLARATIONS BY CO-CONSPIRATORS AND TO SUSTAIN A CONVICTION FOR CONSPIRING TO IMPORT CONTROLLED SUBSTANCES CONFLICTED WITH UNITED STATES SUPREME COURT RULINGS ON ANALAGOUS CONSPIRACY CASES.

Petitioner contends that the procedure by which the Trial Court determined the admissibility of hear-say declarations by co-conspirator, LICATA, violated the dictates of applicable Supreme Court Authority on two grounds. FIRST, the Trial Court permitted the Government to offer the disputed conversations before a determination had been made as to whether the requisite independent proof of conspiracy existed to justify exposing the fact-finder to hear-say declarations of co-conspirators. In this case, wholesale reception of hear-say conversations into evidence subject

to a later determination of inadmissibility necessarily creates the risk of extraordinary prejudice to a defendant in every case where the Court determines ultimately that the evidence fails to demonstrate proof aliunde of the defendant's membership in the conspiracy charged and the Court must hope that cautionary instructions will effectively remove the sometimes highly prejudicial effect of the hear-say declarations from the juror's minds.

The unfairness of exposing the fact-finder to pages and pages of statements by a co-conspirator hear-say declarant is addressed under precisely analagous circumstances in the case of Bruton -v- United States, 391 U.S. 123, 88 S.Ct. 1620 (1968). In Bruton, the confession of a co-defendant was admitted subject to instructions to the jury that they

disregard it as to defendant, Bruton. Thus, a situation arose precisely analagous to that of the case at bar. Bruton contended that he was subjected to extremely prejudicial hear-say testimony without the opportunity to cross-examine the declarant. The Bruton Court's reasoning can be summed up in the following quotation: "The naive assumption that prejudicial effects can be overcome by instructions to the jury....all practicing lawyers know to be unmitigated fiction." The Court further went on to discuss the manner in which any normal fact-finder, whether jury or Judge, receives and understands evidence:

> A jury cannot segregate evidence into separate intellectual boxes.... It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has com-

> mitted those same criminal acts with A....

The reasoning in Bruton is precisely applicable to the case at bar, although the Bruton Court's holding was certainly not an explicit attempt to deal with the problem of hear-say statements by alleged co-conspirators, it certainly provides an unequivocal guideline for a Trial Judge. In other words, the teaching of Bruton would, the defense respectfully submits, mandate that a Trial Judge not permit hear-say evidence to be brought to the jury's attention until the independent evidence of a conspiracy's existence and the defendant's participation therein have been expounded fully. It would appear that only in the most exceptional circumstances should a rule as simple as this be breached.

No practical reason existed why conversations of the Petitioner could

not have been played first for the jury and for the Court in order to permit a determination of whether independent evidence of conspiracy existed. The reasoning of Bruton would dictate that permitting the jury to hear the hear-say testimony in any but the most exceptional circumstances, exposes the fact-finder to highly prejudicial evidence which they cannot possibly remove from their mind should the Trial Court determine at the close of the Government's case that insufficient evidence was propounded to support the admission of co-conspirators' hear-say declarations.

THE SECOND way in which the Trial Court's practice of provisionally admitting vast blocs of hear-say evidence served to undermine the clear import of a substantial line of cases in this Court is that the Trial Judge found suf-

ficient independent evidence of conspiracy only by referring to the very statements by Petitioner's co-conspirator to third parties, the admissibility of which was in the process of being determined.

The proposition that evidence tending to prove the existence of a conspiracy must be totally independent of any hear-say evidence sought to be admitted after proof of the conspiracy is explicitly enunciated by the United States Supreme Court. The Opinion of MR. JUSTICE JACKSON concurring in Krulewitch -v- United States, 336 U.S. 440 at 453 (1949) deals precisely with this issue:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible

> against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodge-podge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal -v- United States, 332 U.S. U.S. 535, 559, 68 S.Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See Skidmore -v- Baltimore & Ohio R. Co. (2 Cir. 19), 167 F.2d 54 [Emphasis added]

Even had the Trial Court in this case been able to completely banish from his mind the hear-say declarations by the Petitioner's co-conspirator in order to determine whether independent evidence

of conspiracy existed to support admission of those declarations, the clear import of the passage quoted from Krulewitch is that the United States Supreme Court doubts that judges are capable of such feats of mental segregation with any greater success than jurors enjoy, See Bruton.

II. THE CIRCUIT COURT OF APPEALS HOLDING THAT THERE EXISTED SUFFICIENT EVIDENCE OF PETITIONER'S MEMBERSHIP IN A HEROIN IMPORTATION CONSPIRACY TO PERMIT INTRODUCTION OF HEAR-SAY DECLARATIONS BY CO-CONSPIRATORS AND TO SUSTAIN A CONVICTION FOR CONSPIRING TO IMPORT CONTROLLED SUBSTANCES CONFLICTED WITH OTHER VERY RECENT CONSPIRACY DECISIONS IN THE THIRD CIRCUIT COURT OF APPEALS.

The Trial Court's determination that sufficient independent evidence of conspiracy existed in order to support the admissions of hear-say declarations by co-defendant, LICATA, was incorrect

according to the tests set out in most recent Third Circuit Courtof Appeals' cases dealing with the evidence sufficient to prove conspiracy. For example, the case of United States -v- Cades, 495 F.2d 1166 (1974 , 3 Cir.) sets forth three tests for determining the existence of a conspiracy and the membership of a particular defendant in that conspiracy. Applying these three tests to the facts discovered by independent surveillance of the Petitioner, as well as to the conversations actually involving the Petitioner, leads to the conclusion that there did not exist evidence sufficient to even form an independent foundation for belief that the Petitioner was a member of a conspiracy with the objective of importing heroin into this country. The first criteria for a defendant's membership in a conspiracy as set forth in Cades is whether the suspected co-conspirator

received a promise of remuneration from the eventual completion of the object of the conspiracy. Under the evidence in this case, Petitioner was never promised in any conversation with any alleged co-conspirator that he would enjoy the fruits of the conspiracy. Secondly, Cades suggests that actual receipt of money by the alleged co-conspirator is probative of his membership in the conspiracy. Again, this test is inapplicable to Petitioner, FRESTA, under all the evidence introduced by the prosecution at trial. Finally, the third test suggested by Cades is most poignantly applicable to the facts in Petitioner's trial. The Cades Court suggests that attempts by the alleged conspirator to conceal his acts in furtherance of the conspiracy, indicate his membership therein. Consider that FRESTA lent his driver's license and other identification to his co-defendant, GAETANO LICATA, for use on

a trip which eventually took LICATA to Canada and which left a trail of FRESTA'S name at airplane depots, gas stations, motels, and restaurants, along the heroin junket which ended with LICATA'S arrest. Thus, applying the evidence to the only reasonable test proposed in Third Circuit cases for determining the existence of a conspiracy, FRESTA'S membership in the LICATA co-conspiracy is denied.

In fact, FRESTA'S acts, as Petitioner's counsel argued strenuously at the trial, are more consistent with the innocent act of lending a driver's license and other identification to LICATA for the purpose of LICATA using them on what was to be a vacation trip. United States -v- Cades addresses itself to the circumstance of an alleged co-conspirator whose acts are equally consistent with guilty membership in the conspiracy and with

innocent objectives, 495 F.2d, 1166 at page 1170:

> From all the evidence shows, Bloom could well have believed that he was being very successful in practicing an artful subterfuge on City Bank. He could have believed that Cades was nothing more than a hoodwinked conduit making possible the operation of his scheme; Bloom might have thought that Cades was acting in what he perceived to be the bank's best interest, intending only to extend Scooper-Dooper credit by honoring checks that were not immediately good. The record does not support an inference, even three times removed from the evidence, that Bloom intended to aid and abet Cades' violation of §656. We conclude that the Government failed to prove its case beyond a reasonable doubt.

Thus, the Trial Court, had it applied the standards for determining the existence of a conspiracy which are pomulgated by recent decisions in this Circuit Court of Appeals, should properly have found insufficient evidence of FRESTA'S membership in the conspiracy to permit

admission of any of the hear-say declarations by alleged co-conspirators.

Perhaps the reason for the Trial Court's incorrect determination of the initial question as to the existence of a conspiracy and FRESTA'S membership therein, is a misapprehension of the quantum of proof necessary to prove the existence of conspiracy. The Trial Court in its Memorandum denying the Motion for New Trial and in Arrest of Judgment stated that the Government's burden in establishing the proof aliunde standard is to prove the existence of a conspiracy by substantial evidence and then, by merely the slightest evidence, to prove the membership in the conspiracy of the defendant against whom hear-say declarations are sought to be admitted. The Third Circuit Court of Appeals in the recent case of United States -v- DeCavalcante, 440 F.2d 1272 (1971, 3 Cir.) reviewed a Trial Court's determination of the question of whether sufficient proof

of conspiracy existed to permit introduction of hear-say against a co-conspirator. In that case, the Court initially stated that the determination of the conspiracy's existence and the particular parties' membership therein must precede any introduction of the hear-say statements:

> The next important issue raised by the defendants is whether they were entitled to judgments of acquittal on the conspiracy count. Under the teaching of Glasser -v- United States, 315 U.S. 60, 74-75, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the prosecution must establish by substantial evidence, restricted to proof aliunde, the fact that a conspiracy existed. "Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it." United States -v- Cohen, 197 F.2d 26, 29 (3rd Cir., 1954); United States -v- Weber, 437 F.2d 327, (3rd Cir., 1970). These principles require that in assessing the evidence of the existence of a conspiracy and each defendant's connection with it, hear-say statements of other alleged co-conspirators (including co-defendants) must

> be excluded from consideration. Only when the Court finds that there is enough evidence of a conspiracy and a particular person is connected with it, may hear-say statements made by co-conspirators be used against him.

Thus, the clear import of the quoted statement from DeCavalcante is that the proof aliunde of conspiracy must be determined independently of the third party hear-say declaration sought to be admitted.

In DeCavalcante, the Court applied its test to facts which gave extremely strong evidence of the existence of a conspiracy, yet very speculative proof that the defendant against whom the hear-say sta tements were sought to be admitted, was actually a member of that conspiracy. The Court concluded that taking all the evidence which it might properly consider— exclusive of the hear-say statements sought to be admitted which could not be considered at that point — the requisite

element for demonstrating proof aliunde was absent. In other words, the Government had failed to demonstrate the actual knowing agreement of the defendant to participate in the acts at which the conspiracy was directed. In that case, as in this case, no particular conduct or verbal expression of agreement to enter the conspiracy by the Petitioner existed. As the Court observed, "all the connecting links needed in the story to prove a conspiracy — that is, the existence of an agreement — are supplied only by the prosecution's arguments." Had the Trial Court and the Circuit Court of Appeals in this Petitioner's case engaged in the extensive and careful review of the evidence that the DeCavalcante and Cades Courts did, they would have concluded that there existed insufficient evidence to prove the Petitioner's membership in a conspiracy. Thus, in Petitioner's

case, the Third Circuit Court of Appeals, although it did not for all practical purposes write an Opinion justifying its affirmance, implicitly relaxed the ordinary standard for determining sufficient independent evidence of conspiracy to support hear-say admissions.

III. THE EFFECT OF THE THIRD CIRCUIT COURT OF APPEALS' RELAXATION OF THE TRADITIONAL STANDARD OF EVIDENCE SUFFICIENT TO PROVE CONSPIRACY RAISES SO GREAT A LIKELIHOOD OF INNOCENT DEFENDANTS' BEING CONVICTED AS TO WARRANT THIS COURT'S INTERVENTION.

The case at bar perfectly exemplifies the potential harm to the fact-finding process which may result from relaxing the restrictions on introduction of hear-say declarations made by alleged co-conspirators of the defendant against whom they are to be admitted. In this particular case, for example, the evidence exclusive of hear-say against the Petitioner

indicated that he engaged in extensive conversations with his co-defendant and that there were terms used in those conversations which could only be explained as code words or some shorthand notation for other than that which they purported to represent. In addition to that evidence resulting from conversations, there was evidence in the form of records of physical surveillance indicating that the Petitioner had supplied two suitcases as well as driver's license and other identification to his co-defendant for use on a trip. The Petitioner's defense at trial argued insistently that all such conduct by the Petitioner was consistent with innocent motivation. At worst, the Petitioner could have been guilty of a minor State motor vehicle infraction, lending his driver's license to his co-defendant, a convicted felon who was not

permitted to have a license. Nevertheless, the Trial Court permitted agents of the Bureau of Narcotics and Dangerous Drugs to speculate that the code terms or phrases used in conversations involving FRESTA indicated an awareness of the narcotics importation scheme in which the Petitioner's co-defendant was engaged. Therefore, evidence came into the trial of Petitioner which was highly probative that LICATA, as well as his co-conspirators, were engaged in a massive heroin importation scheme. Despite the fact that not once in all of the evidence introduced was there a mention of the Petitioner except in those conversations which he personally participated in, the jury was left free to speculate that the Petitioner was responsible for all those statements made by the various and sundry co-conspirators whom he was speculated to have entered a criminal agreement with. Thus, the

Petitioner's possible commission of a minor motor vehicle infraction resulted in his eventual conviction for a most serious narcotics offense resulting in a prison sentence of ten years.[1/] Suprme Court intervention is necessary to prevent such manifest injustice from becoming commonplace in cases of conspiracies such as this one.

1/ The inequity of permitting the Government to introduce the statements of LICATA and other co-conspirators against the Petitioner was magnified by the Trial Court's refusal to grant sufficient continuance in the trial to permit the Petitioner the opportunity to secure the testimony of co-defendant, LICATA. The one witness who could have gainsaid Petitioner's conscious participation in the narcotics conspiracy was thus made unavailable for trial.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL

-v-

GAETANO LICATA
and
LOUIS ANTHONY FRESTA,JR. : NO. 73-177

MEMORANDUM AND ORDER

BECHTLE, J. DECEMBER 7th,1973

Louis Anthony Fresta, Jr., was tried and found guilty by a jury on each of three counts of an indictment charging him with conspiracy to manufacture and distribute and dispense a controlled substance, 21 U.S.C. §841(a)(1); conspiracy to import a controlled substance into the United States, 21 U.S.C. §952(a); and aiding and abetting an individual traveling in interstate commerce in furtherance of an illicit enterprise, 18 U.S.C. §2 and 1952. The defendant has filed a motion for a new

trial and motion for judgment of acquittal, in which several points of error are cited in support of the respective motions. The principal contention advanced by the defendant is that the trial court committed error in permitting testimony as to the hearsay declarations of the defendant's alleged co-conspirators made in the course of and in furtherance of the conspiracy. A detailed examination of the entire record, including the briefs and memoranda submitted by the Government and defense counsel, has convinced the Court that the various grounds raised by the defendant do not constitute a sufficient basis for the granting of the relief requested. Accordingly, defendant's motions for a new trial and judgment of acquittal will be denied.

The thrust of the Government's case was that Fresta, together with Gaetano Licata[1] and two other unindicted co-conspirators[2] did combine and conspire to import into the United States from Montreal, Canada, large quantities of

1/ Although indicted as a co-conspirator in this case, the Government was unable to bring Gaetano Licata to trial. Licata is presently serving a 25-year prison sentence in Canada for crimes committed in the furtherance of this conspiracy. The circumstances surrounding Licata's arrest and imprisonment in Canada are covered in other parts of the Court's opinion.

2/ The two unindicted co-conspirators have been identified as Pasquale Falcone and Frank Dasti. Falcone and Dasti have been convicted and sentenced in the United States District Court for the District of New Jersey to prison terms of ten and twenty years, respectively, for their participation in this conspiracy. The Government alleged in the indictment that Falcone arranged for Licata to meet Dasti in Canada for the purpose of purchasing heroin from Dasti. Dasti had been under investigation by the Royal Canadian Mounted Police since 1968 as a suspected trafficker in narcotics.

Fresta and Licata and between Licata and Pasquale Falcone were overheard by the DEA agents assigned to the investigation of this case. Recordings of the conversations were played during the trial and interpreted by Agent Vincent DiStefano of the DEA. The intercepted messages included references to such things as "a 50-piece band at $25 a head," "a tune named Lil," "brown floor tile at $.07 a block," "a four-piece group," and other obscure and secretive topics. Agent DiStefano, the supervising agent in connection with this case, testified that the above terminology was actually code or "street talk" customarily utilized by those engaged in illicit narcotics activiyy in order to avoid detection by law enforcement authorities. Based on his prior experiences in the investigation of narcotic offenses and

and specifically from the investigation of the conspiracy in question, Agent DiStefano further testified that "a 50-piece band at $25 a head" meant 50 kilos of heroin at $25,000 a kilo, that "a tune named Lil" was a reference to a female distributor of the controlled substance methamphetamine, and that "brown floor tile at $.07 a block" described the purchase of heroin at $700 an ounce.

Conversations between Fresta and Licata contained numerous references to "going up there," "traveling over there," and the quality of the "tile". During one conversation, Fresta stated that he intended to sell the "tile" for "$.09 a block". There was also a series of conversations in which the use by Licata of Fresta's driver's license while "up there" was discussed. Without describing in detail the content of all

the conversations intercepted by the wire-tap and played back at trial, suffice it to say that the conversations among the co-conspirators were replete with references to obscure, furtive, and, when viewed in conjunction with all of the surrounding circumstances, drug-related activity.

The Government produced Agent Robert Walker of the DEA, who testified that on December 7, 1972, he followed Licata, who was driving a 1972 Thunderbird automobile, from 904 Christian Street, in Philadelphia to the Gulf and Western Building in New York City, New York.

On December 13, 1972, Licata made a second trip to the Gulf and Western Building in New York City. On this trip, he was initially followed by Agent DiStefano, who gave way to Agent Walker as Licata proceeded north on the New Jersey Turnpike. Testimony revealed that

Licata entered the Gulf and Western Building, exited the building approximately ten minutes later accompanied by Pasquale Falcone, and that the two men proceeded by automobile to the John F. Kennedy Airport in New York City.

Agent Michael Campbell of the New York Office of the DEA testified that he was stationed at the ticket counter of Air Canada Airlines when he observed Licata and Falcone approach the counter. The two men were informed that their scheduled flight to Montreal, Canada, had been cancelled. At approximately 12:45 P.M. on December 13, 1972, Licata and Falcone departed the airport, entered Licata's 1972 Thunderbird, and drove back to the Gulf and Western Building.

The following day, the two men returned to the John F. Kennedy Airport and flew to Montreal, Canada, on Air Canada

Flight 749, Landing at Dorval International Airport. Licata's reservations on the flight were under the name Louis Fresta.

While in Montreal, Canada, Falcone and Licata met with Frank Dasti in the Smith-duPont Bar in downtown Montreal. As discussed earlier in this opinion, Dasti was under investigation at this time by the Royal Canadian Mounted Police ("RCMP") as a suspected heroin trafficker.

Later that day, Licata and Falcone arrived back at the Dorval Airport. When asked his name by the Immigration Officer, Licata identified himself as Louis Fresta.[3/] The two men boarded Flight 758 and returned to John F. Kennedy Airport.

3/ At trial, Officer Ghislain Mercier, of the Royal Canadian Mounted Police, identified a photograph as the one he took of Licata and Falcone at the Dorval International Airport.

The Government then called Agent Donn Jerri Miller of the DEA. The agent testified that on December 15, 1972, at approximately 7:30 a.m., he was stationed on the listening post of the wiretap when Licata called Fresta on the telephone and requested that the latter bring two suitcases to 904 Christian Street. After overhearing the conversation, Agent Miller proceeded to the vicinity of the 9th and Christian Street where he observed Fresta and Licata placing the suitcases in the trunk of Licata's Thunderbird automobile.

Licata was then followed to the Franklin Square Apartments in Glendora, New Jersey. At this location, the suspect was joied by a woman later identified as Gino Russo. Licata and the woman then drove directly to New York City where agents from the New York and Newark Offices of the DEA assumed the surveillance

responsibilities.

The agents subsequently established surveillance at the Sheraton-Mt. Royal Hotel in Montreal, Canada, where Licata was observed entering and leaving the hotel on various occasions. Agents involved in the investigation maintained constant surveillance over Licata during his stay in Canada. On one occasion in particular, Officer O'Neal Pouliot, of the RCMP, observed Licata open the passenger side of his automobile, push forward the front seat, and arrange something on the back seat or floor of the car. Shortly thereafter, Licata and Miss Russo left the hotel in which they were staying and proceeded toward the Canada-Vermont border.

On December 18, 1972, just before the couple crossed over the border into the United States, the vehicle was inter-

cepted by the RCMP. Twenty (20) bags of heroin concealed under the back seat were removed from the car.[4/] Gaetano Licata was arrested and detained in Montreal. On his person, the Canadian police found a receipt from the Sheraton - Mt. Royal Hotel, an automobile driver's license, and a Social Security card -- all under the name Louis Fresta. In addition to the heroin, two suitcases identified as belonging to Louis Fresta were found in the car.

4/ The Government and the defendant stipulated that the twenty polyethylene bags taken from under the back seat of Licata's vehicle on December 18 by the Canadian police contained 9.582 kilograms of heroin which is approximately 21 pounds of heroin. Fourteen of these bags contained 100% pure heroin; one bag contained 99% pure heroin; three of these bags contained 98% pure heroin, and the remaining two were filled with 92% pure heroin.

Admissions of Hearsay Declarations of the Defendant's Co-conspirators

Defendant argues that the trial court erred in permitting testimony to be given as to hearsay statements made by co-conspirators, during the course of and in furtherance of the conspiracy. The law is well settled that once the prosecution establishes the existence of the conspiracy by clear and substantial evidence independent of the hearsay declarations and, further, establishes the defendant's participation therein, the hearsay statements of the co-conspirators are admissible against the defendant. Glasser -v- United States, 315 U.S. 60, 74, 62 S.Ct. 457; United States -v- DeCalvalcante, 440 F.2d 1264, 1272 (3rd Cir. 1971); United States -v- Weber, 437 F.2d 327, 336 (3rd Cir. 1970).

The defendant has raised the issue of the sufficiency of the evidence necessary to connect him with the conspiracy.

Fresta contends that the Government must present substantial evidence of the defendant's membership in the conspiracy, exclusive of the hearsay statements, before the statements are admissible in evidence. Although both the existence of the conspiracy and the defendant's participation therein must be established by evidence independent of the hearsay, once the conspiracy is established by clear and substantial evidence, slight evidence is sufficient to connect the defendant with such conspiracy and to permit the admission of the hearsay statements of the alleged co-conspirators. United States -v- DeCavalcante, supra; United States -v- Weber, supra; United States -v- Cohen, 197 F.2d 26, 29 (3rd Cir. 1952).

This Court is convinced that the Government established by substantial

evidence, independent of the hearsay, the existence of the conspiracy to import heroin into the United States from Canada. The Government presented evidence of Licata's three vehicular excursions to New York City and the final trip to Canada which terminated abruptly when Canadian authorities intercepted the vehicle and uncovered therein twenty-one pounds of heroin. There was testimony as to Licata's association with Pasquale Falcone in connection with the two flights to Canada via Air Canada, only one of which actually resulted in a flight to Montreal, Canada. The Canadian police officer testified concerning the meeting of Licata, Falcone, and Dasti in the Montreal bar just a few days before Licata was apprehended with the heroin in his possession. The Government showed by uncontradicted evidence that Fresta furnished Licata with two

suitcases, his driver's license, and Social Security card before Licata left for Canada. In addition, the fact of the frequent telep hone contacts between Fresta and Licata and between Licata and Falcone (exclusive of the hearsay content of such calls) points out the close confederacy of these persons. When all the evidence is viewed in conjunction, the existence of the conspiracy is clearly established.

Similarly, the Government introduced sufficient evidence to connect Fresta to the unlawful venture. As indicated above, Fresta supplied Licata with the driver's license, Social Security card and suitcases to enable Licata to travel to Canada. These two individuals were in each other's company and conversed over the telephone frequently during the brief period in which the events now

under scrutiny occurred. Finally, certain of the incriminating statements made by Fresta over the telephone (e.g., "I'm going to try sell it for $.09"; "See if they sing a song Lil, you know what I mean", "I don't think the guy is going to want to go there"; "I mean, you know, how is it if my floor -- I mean, is it?") are examples of Fresta's own admissible conduct indicating his involvement in the enterprise. The defendant's own conversations were without exception, couched in terms that bordered between code and a cautious awareness that his participation could be viewed as being incriminating. For example, it is perfectly plain that the defendant's own statements in conversations in which he took part establish that at the heart of his communication with Licata was some kind of profit-making business transaction, as opposed to a

social, recreational or other objective. Further, the fact that reference to a 50-piece band to play before 50,000 people at $25 a head was intended to convey information in respect to the purchase of a quantity of heroin at a certain rate per kilo is evidenced in the conversation of December 2, 1972, at 5:28 p.m. where Fresta and Licata dropped their guard in respect to their code-type of conversation by referring to the alleged musical enterprise in terms of "quantity." The excerpt in question, which was a statement that Licata made to Fresta and in respect to which Fresta acceded, reads as follows:

> "They could but they don't want to because they're getting ah for that kind of quantity for that many people they should put out for less money for tickets." (Emphasis added).

Also, the following excerpt between Licata and Fresta in their conversation on December 11, 1972 at 12:42 p.m. dis-

closes the connection with the identification materials furnished by the defendant, Fresta, together with an awareness of some sort of apprehension. That excerpt reads as follows:

"LICATA: Yea. Has she got that paper work?

FRESTA: Yes she got it last night yea - just went to work today.

LICATA: Listen I'm (sic) going to need that oh your your things again you know.

FRESTA: Yea all right.

Licata: Because if I have to go with this guy I already registered your name.

FRESTA: Oh all right.

LICATA: You follow me?

FRESTA: Yea

LICATA: That one day I used them.. you know what I mean?

FRESTA: Yea

LICATA: It will be just for a day.

FRESTA: Its (sic) all right, you just got to be careful.

LICATA: Yea

FRESTA: All right?

LICATA: Yea. I'll talk to you later Lou take it easy.

FRESTA: So Long, (sic) Yea."

Under the standards established by the authorities heretofore recited in this Opinion as to the extent to which the evidence must show a particular defendant's participation in the conspiracy, the Court believes that that evidence is clear, unmistakable, and well within the range to allow reception into evidence the acts and hearsay statements of the co-conspirators.

Defendant's motions for judgment of acquittal and a new trial will, therefore, be denied.

* *

O R D E R

AND NOW, TO WIT, this 7th day of December, 1973, it is hereby ORDERED

that defendant's motions for judgment of acquittal and a new trial are denied.

IT IS FURTHER ORDERED that defendant Louis Anthony Fresta, Jr., shall appear for sentencing in this case at 9:30 a.m. on Thursday, January 3, 1974, in Courtroom 3.

/s/
LOUIS C. BECHTLE, J.

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

NO. 74-1148

UNITED STATES OF AMERICA

-v-

GAETANO LICATA
LOUIS ANTHONY FRESTA, JR.

LOUIS ANTHONY FRESTA, JR.,
Appellant

On Appeal from Judgment of the United States District Court for the Eastern District of Pennsylvania - C.A. No. 73-177

Argued July 18, 1974

Before: ADAMS, ROSENN and HUNTER,
Circuit Judges

ROBERT F. SIMONE, Esquire
Philadelphia, Pa. 19102
Counsel for Appellant

ROBERT E. J. CURRAN
U.S. Attorney
Eastern District of Penna.
STEPHEN STEIN
Special Attorney
Dept. of Justice
SHIRLEY BACCUS-LOBEL
TERENCE M. BROWN
Department of Justice
Washington, D.C. 20530

JUDGMENT ORDER

Louis Anthony Fresta challenges, on this appeal, his conviction after a jury trial, of conspiring to manufacture and distribute controlled substances in violation of 21 U.S.C. §841(a)(1) and of conspiring to import controlled substances in violation of 21 U.S.C. §952(a).

Fresta first contends that the government did not have reasonable cause to believe at the time it obtained warrants for the electronic surveillances at issue that conversations relating to unlawful activities would take place at the particular telephone that was subject to the electronic surveillance. Thus, according to Fresta, suppression of the contents and fruits of these conversations was warranted.

Second, Fresta asserts that the government did not establish by evidence aliunde the existence of a conspiracy, thereby rendering inadmissible hear-say statements of alleged co-conspirators. These statements were, in fact, admitted at trial.

After careful consideration of appellant's contentions, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/
Circuit Judge

Attest:

/s/
Thomas F. Quinn
Clerk

DATED: Jul. 22, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 74-1148

UNITED STATES OF AMERICA

-v-

GAETANO LICATA and LOUIS ANTHONY FRESTA, JR.,
Louis Anthony Fresta, Jr.,
Appellant

(D.C.C.A. No. 73-177)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADMAS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges

The petition for reharing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

/s/
Circuit Judge

Dated: August 13, 1974

RECEIVED & FILED

Aug. 13, 1974

Thomas F. Quinn,
Clerk

AFFIDAVIT OF SERVICE

I, JAMES T. VERNILE, on September 12, 1974, served three copies of this Petition for Certiorari on the Solicitor General, Department of Justice, Washington, D.C., and one copy on Terrence M. Brown, Esquire, United States Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044, by First Class Mail, Certified, Return Receipt Requested.

James T. Vernile.
JAMES T. VERNILE

Sworn to and Subscribed:
before me this 12 day:
of September, 1974.

Notary Public
My Com. Expires:

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires June 11, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-271

LOUIS ANTHONY FRESTA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); of conspiring to import heroin, in violation of 21 U.S.C. 952(a); and of aiding and abetting travel in interstate commerce to facilitate an unlawful activity, in violation of 18 U.S.C. 2 and 1952. He was sentenced to concurrent terms of five and ten years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. 61-63). Petitioner contends that the district court erred in allowing the government, before establishing petitioner's involvement in the conspiracy, to present hearsay statements made by petitioner's co-conspirators, and that the district court erred in finding that independent evidence showed such an involvement.

The evidence at trial, which consisted primarily of testimony from law enforcement officials and tape recordings of conversations between the conspirators, which had been intercepted pursuant to court orders under 18 U.S.C. 2510, *et seq.*, revealed that petitioner and Gaetano Licata, as well as two unindicted co-conspirators, Pasquale Falcone and Frank Dasti, conspired to smuggle a substantial quantity of heroin from Canada.[1] The conspiracy culminated in Licata's arrest on December 18, 1972, as he attempted to enter the United States from Canada with some twenty-one pounds of heroin in his possession (2 T. 55-57; 3 T. 23-24).[2]

The jury heard a series of recorded conversations between Licata and petitioner and between Licata and Falcone, in which the conspirators used code or "street talk" in their discussions. A federal narcotics agent was then qualified as an expert, and he interpreted certain cryptic portions of the conversations in which the participants used terms such as "a big band," "$25 per head," and "brown floor tile." According to the agent, the second conversation the jury heard involved a discussion between Licata and petitioner concerning a potential purchase of a large quantity of heroin. The gist of the conversation, in the agent's opinion, was that Licata was telling the defendant that the people who were going to finance the purchase were dickering as to the price to be paid (1 T. 98-99, 103).

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[1]Falcone and Dasti were separately tried and convicted in the United States District Court for the District of New Jersey. See Pet. App. 42, n. 2. Licata was tried and convicted in Canada, where he is presently serving a twenty-five year sentence. See Pet. App. 42, n. 1.

[2]"T." refers to the four-volume trial transcript.

In a subsequent conversation, petititioner and Licata discussed buying "brown floor tiles" at 7¢ a block and selling them at 8¢. According to the agent, they were again using code to disguise the fact that this was a discussion of a potential purchase of heroin (2 T. 91-94).

In a conversation on December 11, 1972, Licata, in an apparent reference to petitioner's identification papers, indicated that he was going to need petitioner's "things" because "I already registered your name"; petitioner agreed but warned that "you just got to be careful" (Pet. App. 57-58).

On December 14, 1972, Licata and Falcone flew to Montreal from New York. Licata's reservation was in petitioner's name. Upon arriving in Montreal they took a taxi to the Smith DuPont Bar, where they met Frank Dasti, whom Canadian authorities had been investigating as a suspected heroin trafficker. Dasti drove them back to the airport in Montreal, and they returned to New York (2 T. 43-44; 3 T. 21).

On the following morning Licata called petitioner and told him that he had to see him, that "it's very important." Licata also wanted to borrow petitioner's suitcases (Petitioner's C.A. App. 186-187).[3] Shortly thereafter, petitioner and Licata placed the suitcases in Licata's car (*id.* at 161; 2 T. 49).

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[3]We are lodging with the Clerk of this Court a copy of petitioner's Court of Appeals Appendix, which includes transcripts of the intercepted conversations in which petitioner was a participant.

That afternoon, Licata left for Canada by automobile. While there, he registered in petitioner's name at the hotels in which he stayed (2 T. 85; 3 T. 25). When he attempted to leave Canada on December 18, 1972, his car was searched and approximately ten kilograms of heroin were seized from behind the seat (2 T. 55-57; 3 T. 23-24). Licata had petitioner's driver's license and social security card in his wallet (3 T. 31).

1. The rule is well established that, pursuant to the so-called co-conspirator exception to the hearsay rule, declarations of a co-conspirator made in furtherance of the conspiracy are admissible against a defendant who was not present when they were made, so long as there is independent proof of the conspiracy and the defendant's part therein. *E.g., Glasser* v. *United States*, 315 U.S. 60, 74. Petitioner contends, however, that it was error for the trial court to allow the government to play recordings of conversations between conspirators other than petitioner prior to the government's production of independent evidence of the conspiracy and his connection therewith.[4]

Every circuit that has considered this question has held, contrary to petitioner's contention, that the order of proof in such circumstances is within the trial court's discretion.[5] *E.g., United States* v.

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[4]The second tape played was in fact the one in which petitioner and Licata discussed the purchase of heroin. The first tape the jury heard was a short, rather innocuous conversation between Licata and Falcone for which no expert testimony was offered. Thus, independent evidence of petitioner's involvement in the conspiracy was in fact presented prior to almost all the hearsay declarations.

[5]Petitioner's assertion (Pet. 32-33) that the Third Circuit, in *United States* v. *DeCavalcante*, 440 F. 2d 1264, "stated that the determination of the conspiracy's existence and the particular parties' membership therein must precede any introduction of the hearsay statements" is inaccurate. The question of the order of proof was not there in issue, and the court made no such assertion.

Geaney, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied sub nom. *Lynch* v. *United States*, 397 U.S. 1028; *Nelson* v. *United States*, 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060; *United States* v. *Acuff*, 410 F. 2d 463, 466 (C.A. 6), certiorari denied, 396 U.S. 830; *United States* v. *Halpin*, 374 F. 2d 493, 495 (C.A. 7), certiorari denied, 386 U.S. 1032; *Fabian* v. *United States*, 358 F. 2d 187, 192 (C.A. 8), certiorari denied, 385 U.S. 821; *United States* v. *Castanon*, 453 F. 2d 932, 934 (C.A. 9), certiorari denied, 406 U.S. 922; *Beckwith* v. *United States*, 367 F. 2d 458, 460 (C.A. 10). In the instant case there was no abuse of discretion in the trial court's decision to allow the government to play the tapes in chronological order.[6]

2. Petitioner also contends that the independent evidence was insufficient to support the finding necessary to the admissibility of the hearsay statements that petitioner was involved in a conspiracy. This claim is without merit.

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[6]Contrary to petitioner's suggestion (Pet. 21), *Bruton* v. *United States*, 391 U.S. 123, is not applicable to this case. In *Bruton*, this Court held that instructions requiring the jury to disregard a co-defendant's confession in considering the defendant's guilt or innocence were not sufficient to protect the defendant against prejudice. The principal basis of that ruling was of course the fact that the confession was not admissible against the defendant. In contrast, the hearsay statements of petitioner's co-conspirators were admissible against petitioner (see pp. 5-8, *infra*), and there was therefore no need even for the kind of limiting instruction given in *Bruton*. See *Dutton* v. *Evans*, 400 U.S. 74. Petitioner's argument, therefore, presumably is that the trial judge himself, in making a subsequent determination whether a defendant's involvement in a conspiracy was established by independent evidence, would be unable to separate the evidence already received and ignore damaging hearsay statements of co-conspirators. We do not believe that such a segregation would be intellectually difficult; the district court below (Pet. App. 40-60) apparently experienced no difficulty in so proceeding.

We rely upon the findings of the district court (Pet. App. 53-59):

> This Court is convinced that the Government established by substantial evidence, independent of the hearsay, the existence of the conspiracy to import heroin into the United States from Canada. The Government presented evidence of Licata's three vehicular excursions to New York City and the final trip to Canada which terminated abruptly when Canadian authorities intercepted the vehicle and uncovered therein twenty-one pounds of heroin. There was testimony as to Licata's association with Pasquale Falcone in connection with the two flights to Canada via Air Canada, only one of which actually resulted in a flight to Montreal, Canada. The Canadian police officer testified concerning the meeting of Licata, Falcone, and Dasti in the Montreal bar just a few days before Licata was apprehended with the heroin in his possession. The Government showed by uncontradicted evidence that Fresta furnished Licata with two suitcases, his driver's license, and Social Security card before Licata left for Canada. In addition, the fact of the frequent telephone contacts between Fresta and Licata and between Licata and Falcone (exclusive of the hearsay content of such calls) points out the close confederacy of these persons. When all the evidence is viewed in conjunction, the existence of the conspiracy is clearly established.
>
> Similarly, the Government introduced sufficient evidence to connect Fresta to the unlawful venture. As indicated above, Fresta supplied Licata with the driver's license, Social Security card and suitcases to enable Licata to travel to Canada.

These two individuals were in each other's company and conversed over the telephone frequently during the brief period in which the events now under scrutiny occurred. Finally, certain of the incriminating statements made by Fresta over the telephone (*e.g.*, "I'm going to try to sell it for 9c"; "See if they sing a song Lil, you know what I mean", "I don't think the guy is going to want to go there", "I mean, you know, how is it if my floor — I mean, is it?") are examples of Fresta's own admissible conduct indicating his involvement in the enterprise. The defendant's own conversations were without exception couched in terms that bordered between code and a cautious awareness that his participation could be viewed as being incriminating. For example, it is perfectly plain that the defendant's own statements in conversations in which he took part establish that at the heart of his communication with Licata was some kind of profit-making business transaction, as opposed to a social, recreational or other objective. Further, the fact that reference to a 50-piece band to play before 50,000 people at $25 a head was intended to convey information in respect to the purchase of a quantity of heroin at a certain rate per kilo is evidenced in the conversation of December 2, 1972, at 5:28 p.m. where Fresta and Licata dropped their guard in respect to their code-type of conversation by referring to the alleged musical enterprise in terms of "quantity."

* * * * *

Also, the * * * excerpt between Licata and Fresta in their conversation of December 11, 1972 at 12:42 p.m. discloses the connection with the identification materials furnished by the defendant, Fresta, together with an awareness of some sort of apprehension.

The court then ended its findings with the correct declaration that the evidence was "clear, unmistakable, and well within the range to allow reception into evidence the acts and hearsay statements of the co-conspirators" (Pet. App. 59).[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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[7]Petitioner contends further that the instant decision is inconsistent with another Third Circuit case, *United States* v. *Cades*, 495 F. 2d 1166. The court there, in evaluating a conviction for aiding and abetting the misapplication of bank funds, indicated that evidence of attempts to conceal his behavior or to profit from it were important in determining whether the evidence was sufficient to support the conviction.

Petitioner's claim that these tests were not met here is insubstantial. Petitioner's behavior satisfies both tests. As the district court said (Pet. App. 56-57): "* * * it is perfectly plain that the defendant's own statements in conversations in which he took part establish that at the heart of his communication with Licata was some kind of profit-making business transaction, as opposed to a social, recreational or other objective." Moreover, the use of the "code" or "street talk" was obviously an attempt on his part to conceal the illegal topic of their discussions.